CASE NO. 14-10373

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MELINDA O. HAMILTON,

Plaintiff - Appellant

vs.

AVPM CORPORATION; WATERS LANDING APARTMENT,

Defendants – Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISON

BRIEF OF APPELLANT MELINDA HAMILTON

Respectfully submitted,

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JUNE 3, 2014

ORAL ARGUMENT REQUESTED

I. CERTIFIFICATE OF INTERESTED PERSONS
CASE NO. 14-10373

(1) No. 14-10373, Melinda Hamilton v. AVPM Corporation, et al.,
USDC No. 3:13-CV-00038

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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II. STATEMENT REGARDING ORAL ARGUMENT

Oral argument would be helpful in this case to discuss with the Court the evidence in this case supporting Hamilton's discrimination claims and whether the district court engaged in weighing such evidence on summary judgment contrary to the Supreme Court's recent admonition that district courts are not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Tolan v. Cotton*, __S.Ct. __, 2014 WL 1757856 * 4 (U.S. 2014).

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V. JURISDICTIONAL STATEMENT

The Fifth Circuit has jurisdiction to review the final decision by the district court in this case. 28 U.S.C. §§ 1291, 1294.

Memorandum Opinion and Order issued on March 27, 2014. (RE 3).[1] Judgment was entered on March 27, 2014. (RE 4). Notice of Appeal filed on April 1, 2014. (RE 2).

VI. STATEMENT OF ISSUES ON APPEAL

1. The district court erred in granting summary judgment on Melinda Hamilton's claim of race discrimination.
2. The district court erred in failing to consider testimony of Supervisor Robert Englard that while denying he made a statement about the grounds crew being all black, he understood how such a statement would indicate a racial bias.
3. The district court erred in failing to consider Hamilton's former supervisor opinion testimony that Hamilton's termination was due to her race.

[1] Documents contained in Appellant Melinda Hamilton's Records Excerpts are cited to as RE.
[2] Hamilton asserted race and age discrimination claims at the district court level, Hamilton only

VII. STATEMENT OF THE CASE

Hamilton filed suit against Defendants asserting she had been terminated because of her race in violation of Title VII. (ROA. 21-26, 38-42).

Defendants moved for summary judgment. (ROA. 103-337). Hamilton responded. (ROA. 350-504). Defendants objected to two pieces of testimony offered by Hamilton. (ROA. 508-10, 517).

The district court granted summary judgment (ROA. 508-38) stating that "[a]ssuming arguendo that Englard's comment about race of the grounds crew can be considered circumstantial evidence of discriminatory animus, it is weak evidence, and Hamilton has failed to show any meaningful connection between that comment and the decision to terminate her." *Hamilton v. Waters Landing Apartment, et al.*, 2014 WL 12 *7 (N.D. Tex. 2014)(RE 5).

The district court also sustained the two objections made by Defendants to testimony offered by Hamilton.

Hamilton appealed.[2] (ROA. 540-41).

VIII. SUMMARY OF ARGUMENT

Melinda Hamilton ("Hamilton") was an African American employee. Shortly after Robert Englard became her supervisor, he commented that all of the

[2] Hamilton asserted race and age discrimination claims at the district court level, Hamilton only appeals the district court's summary judgment on Hamilton's race discrimination claim.

maintenance employees were African American. (RE 6). Even Englard admits this comment would raise the issue of racial bias. Defendants failed to document performance deficiencies as required by company policy. (RE 7). Defendants' former supervisor told Hamilton that her race and age played a role in her termination. There is ample evidence establishing that the articulated reason for Hamilton's termination was mere pretext for unlawful race discrimination. *Vaughn v. Woodforest Bank*, 665 F.3d 632, 638 (5th Cir. 2013); *Johnson v. Maestri-Murrell Prop. Mgmnt, LLC*, 487 Fed. Appx. 134 (5th Cir. 2012).

IX. FACTS

Melinda Hamilton ("Hamilton") was employed by Defendants from April 12, 2010 until June 11, 2011. (ROA. 503). Hamilton was promoted to Property Manager to the Waters Landing Apartments. (ROA. 136).

Hamilton is a Black African American. (ROA. 450).

Hamilton's supervisors praised her for her work as Property Manager for Defendants. (ROA. 449-50). Defendants paid Hamilton a bonus one month before her termination. (ROA. 395, 398, 449). It is undisputed that Defendants paid Hamilton a bonus in December 2010. Hamilton received two performance-based bonuses from Defendants; one in December 2010, and another one month before her termination. (ROA. 395, 398, 449, 502).

Laura Eaton ("Eaton") was Hamilton's supervisor from April 2010 through May 2011. (ROA. 136-37). Eaton was familiar with Hamilton's job performance. (ROA. 301). Eaton testified that Hamilton improved the Water Landing's property collections. (ROA. 462).

Defendants had a progressive discipline policy that stated each employee would receive an:

a. informal counseling for which written documentation will be placed in the employees file;

b. written warning and counseling, and;

c. termination.

(ROA. 453, 469-73, 496)(RE 8). According to the policy, immediate termination occurred only when an employee committed a "serious violation" such as fighting or assault, destruction of company property, or a drug policy violation. (ROA. 496).

Hamilton never received any documented counseling or disciplinary action as outlined in Defendant's policy before her termination. (ROA. 453-54, 471-72, 481, 485, 503). Eaton never documented any performance problems with Hamilton as required by Defendants' progressive discipline policy nor did she discuss any performance problems about Hamilton with Robert Englard before

Hamilton's termination. (ROA. 468-69). Eaton did not participate in the termination of Hamilton. (ROA. 468).

Robert Englard ("Englard")—a white male—replaced Eaton as Hamilton's supervisor in May 2011. (ROA. 403). Englard was 28 when he took the position. (ROA. 477). Englard never placed any documentation regarding verbal or written warnings given to Hamilton in her employee file as required by Defendants' progressive discipline policy. (ROA. 481-82).

During a visit to Waters Landing, Englard noticed that the grounds crew was exclusively African American and commented to Hamilton on the fact. (ROA. 418, 435-39, 459)(RE 6). Hamilton asked if it was a problem that the grounds crew was black and Englard did not respond and "just kind of left it like that." (ROA. 438)(RE 6). From his tone and lack of response, Hamilton took it that Englard believed that Englard felt African Americans would not be good employees in these positions. (ROA. 452).

Englard denied making the statement; however, he did acknowledge that someone who would make such a statement may have a racial bias:

Q: -- you attended Ms. Hamilton's deposition; correct?

A: Yes

Q: And you heard her testify that you made a comment that her – all of her property staff were African/American. You heard her testify to that; correct?

A: Correct

Q: You deny saying that; correct?

Q: Do you understand how someone would think if someone made that statement, that they might have racial bias?

MR. COWGER: Objection, form.

A: I understand. I understand that, yes.

(ROA. 314-15)(RE 7).

When Englard informed Hamilton of her termination, he did not give a clear explanation for his actions. (ROA. 449). When Englard terminated Hamilton the only reason he gave for the action was Hamilton's failure to adequately maintain the white board, which Hamilton testified was false. (ROA. 449).

In a letter to the EEOC, Defendants stated that Hamilton was unable to handle the position of property manager. (ROA. 498-99). Englard testified he terminated Hamilton because he could no longer trust her to do the job. (ROA. 479-80).

Shortly after Hamilton's termination, Eaton contacted Hamilton and informed her that Benard Englard, the owner of the company, thought they made a mistake in terminating Hamilton because they did not have any reason and asked if she would return to the company. (ROA. 479-80).

Eaton told Hamilton she thought Hamilton's race was a factor in her termination, in part because the company was hiring "bubbly little white girls." (ROA. 430-34).

Hamilton was initially replaced as property manager by Nicole Curiel, who is white. (ROA. 489-90). After Ms. Curiel, Defendants hired Kendra Blackburn, who also was not African American. (ROA. 289).

X. STANDARD OF REVIEW

Summary judgment is appropriate when there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Conoco, Inc. v. Medic Systems, Inc.*, 259 F.3d 369, 371 (5th Cir. 2001). The Court must view facts and inferences in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 243, 255 (1986). Credibility determinations are not part of the summary judgment analysis. *Anderson*, 477 U.S. at 247-49. A judge's function at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Tolan v. Cotton*, __S.Ct. __, 2014 WL 1757856 * 4 (U.S. 2014).

Summary judgment is not favored in employment discrimination cases. *Fierros v. Tex. Dept. of Health*, 274 F.3d 187, 190 (5th Cir. 2001). Even if the Court believes the summary judgment standards have been met, a court has the

discretion to deny a motion for summary judgment if it believes the better course would be to proceed with a full trial." *Anderson*, 477 U.S. at 255.

XI. ARGUMENT AND AUTHORTITIES

A. QUESTION OF FACT ON HAMILTON'S RACE DISCRIMINATION CLAIM

Title VII prohibits race discrimination in employment. 42 U.S.C. § 2000e-2(a). Title VII has been amended to explicitly authorize discrimination claims where an improper consideration like race was a "motivating factor" for the adverse action. 42 U.S.C. § 2000e-2(m) and 2000e-5(g)(2)(B); *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167 (2009).

Discrimination claims can be established through either direct or circumstantial evidence. *Laxton v. Versus Gap, Inc*., 333 F.3d 572 (5th Cir, 2004).

Title VII claims are analyzed under the burden shifting framework set out in *McDonnell Douglas Corp v. Green,* 411 U.S. 792 (1973). Under this framework, the plaintiff must first create a presumption of discrimination by establishing a *prima facie* case of discrimination. *Laxton*, 333 F.3d at 579. The burden then shifts to the employer to produce a legitimate, nondiscriminatory reason for her termination. *Laxton*, 333 F.3d at 579. The plaintiff then bears the ultimate burden of persuading the trier of fact by a preponderance of the evidence that the employer

intentionally discriminated against her because of her protected status. *Laxton,* 333 F.3d at 579.

To carry this burden, the plaintiff must produce substantial evidence indicating that the proffered legitimate nondiscriminatory reason is a pretext for discrimination. *See Reeves v. Sanderson Plumbing*, 530 U.S. 133, 143 (2000). A plaintiff may establish pretext either through evidence of disparate treatment or by showing that the employer's proffered explanation is false or "unworthy of credence." *Reeves*, 530 U.S. at 143. An explanation is false or unworthy of credence if it is not the real reason for the adverse employment action. *See Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 899 (5th Cir. 2002). Evidence demonstrating that the employer's explanation is false or unworthy of credence, taken together with the plaintiff's *prima facie* case, is likely to support an inference of discrimination even without further evidence of defendant's true motive. *Russell v. McKinney Memorial Hospital*, 235 F.3d 219, 223 (5th Cir. 2000). No further evidence of discriminatory animus is required because "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation. . . ." *Reeves*, 530 U.S. at 147-48. A decision as to whether judgment as a matter of law is appropriate ultimately turns on "'the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and

that properly may be considered on a motion for judgment as a matter of law.'" *Wallace v. Methodist Hosp. Sys.*, 271 F.3d at 212, (5th Cir. 2001) (quoting *Reeves*, 530 U.S. at 148-49). A fact finder is free to believe or disbelieve any part of the evidence in making its finding. *See McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986). Rejection of the employer's proffered reasons permits, but does not compel, the fact finder to infer the ultimate fact of intentional discrimination, and no further proof is necessary. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

To establish discriminatory discharge, a plaintiff must first establish a *prima facie* case of discrimination by demonstrating that she: (1) is a member of a protected class; (2) was discharged or otherwise suffered adverse action; (3) was qualified for her position; and (4) was replaced by a member of an unprotected class. *See Meinecke v. H & R Block Income Tax Sch.,* 66 F.3d 77, 83, (5th Cir. 1995); *Vaughn v. Edel,* 918 F.2d 517, 521 (5th Cir. 1990).

Defendants do not contest that Hamilton's prima facie case for purposes of this summary judgment.

B. DEFENDANTS FAIL TO ARTICULATE LEGITIMATE NON-DISCRIMINATORY REASON IN LIGHT OF ITS OWN POLICY

Starting out, Hamilton disputes that Defendants articulated a legitimate, non-discriminatory reason for the immediate termination of Hamilton. *Laxton*, 333 F.3d

at 579. Indeed, the type of conduct which is raised by the Defendants articulated reason for terminating Hamilton does not fall within its own policy on termination because such conduct, even if true, did not constitute a "serious violation" such as a drug policy violation, fighting or assault, or destruction of company property. (ROA. 496).

The trial court wrote that "the court disagrees with Hamilton's interpretation of the guidelines. They do not constrain the defendants' discretion to terminate at-will employees for reasons not mentioned in the termination provision . . .." 2014 WL 1255839 * 3 fn 4. However, the Court conflates the employer's discretion to terminate at will employees with what the employers own guidelines provide is a legitimate non-discriminatory reason for termination.

Hamilton does not assert that the guidelines constrain the Defendants' discretion, but the guidelines demonstrate what the employer thought was a legitimate non-discriminatory reason for termination. Defendants had a policy spelling out when termination was appropriate, thus, it is not unfair to conclude if Defendants do not list in its policy on termination the reason it sought to terminate Hamilton, that it is not a legitimate, non-discriminatory reason for Defendants to terminate Hamilton.

C. THERE IS EVIDENCE ESTABLISHING A FACT ISSUE REGARDING WHETHER DEFENDANTS TERMINATED HAMILTON BECAUSE OF HER RACE

However, even if Defendants articulated a legitimate non-discriminatory reason, there is ample evidence of pretext. The trial court applied an analysis too cribbed for the requirements of summary judgment.

As the Fifth Circuit noted, in *Thornbrough v. Columbus & Greenville Ry. Co*, in the context of a discrimination claim, "Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree. Employers are rarely so cooperative as to include a notation in the personnel file, 'fired due to [protected trait],' or to inform a dismissed employee can." 760 F.2d 633, 638 (5th Cir. 1985).

The Supreme Court observed, in *Desert Palace v. Costa*, 539 U.S. 90 (2003), the text of Title VII leaves "little doubt that no special evidentiary showing is required." 539 U.S. at 99. The Court affirmed the general rule in civil cases that merely "requires a plaintiff to prove his case 'by a preponderance of the evidence,' using 'direct or circumstantial evidence.'" 539 U.S. at 99, citing *Postal Service Bd. Of Governors v. Aikens*, 46 U.S. 711, 714 n. 3 (1980).

In race discrimination cases, the Fifth Circuit has observed:

> "Title VII does not affirmatively require direct evidence from a plaintiff ..." *Smith v. Xerox Corp.,* 602 F.3d 320, 332 (5th Cir. 2010). In cases such as this one where the allegation is that the employer intentionally discriminated against the individual based on her race,

> discrimination can be established either circumstantially or directly. *See Jones v. Robinson Prop. Group, L.P.*, 427 F.3d 987, 992 (5th Cir. 2005) (citing *Portis *137 v. First Nat'l Bank of New Albany, MS.*, 34 F.3d 325, 328 (5th Cir. 1994)).
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> * * *
>
> "[T]he reason for treating circumstantial and direct evidence the same is deeply rooted in the notion that circumstantial evidence may often be more persuasive." *Xerox,* 602 F.3d at 331 (citation omitted).

Johnson v. Maestri-Murrell Prop. Mgmt., LLC, 487 F. App'x 134, 136-37 (5th Cir. 2012).

The ultimate error in the district court's analysis in this case is its attempt to analyze the evidence separately in a vacuum rather than looking at the entire record and its failure to review that evidence in the light most favorable to the non-movant. "[P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *see also* Judge Timothy M. Tymkovich, *The Problem with Pretext,* 85 DENV. U. L. REV. 503, 518-19 (2008) (discussing problem with compartmentalizing or looking to categories of evidence too narrowly in judging pretext). "A play cannot be understood on the basis of some of its scenes but only on its entire performance, ... similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario." *Donaldson v. CDB Inc.*,

335 Fed.Appx. 494, 503 (5th Cir. 2009)(quoting *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir.1990). This is true regardless of who uttered the words or to whom they were directed. Justice Scalia has noted that "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships[.]" *Oncale v. Sundowner Offshores Services*, 523 U.S. 75, 81-82 (1988); see also *Josey v. John R. Hollingsworth Corp*., 996 F.2d 632, 641 (3d Cir.1993)("The court may also consider as circumstantial evidence the atmosphere in which the company made its employment decisions.") The district court's opinion seems to strain to consider Hamilton's individual pieces of evidence in a vacuum rather than as a cumulative whole that creates a fact issue.

Evidence demonstrating that the employer's explanation is false or unworthy of credence, taken together with the plaintiff's *prima facie* case, is likely to support an inference of discrimination even without further evidence of defendant's true motive. *Laxton v. Versus Gap, Inc*., 333 F.3d 572, 580 (5th Cir, 2004)*; Sandstad*, 309 F.3d at 897; *Russell*, 235 F.3d at 223. Of course, Defendants did not dispute Hamilton presented a prima facie case.

At one of his first meetings with Hamilton, Englard made the strange observation that the entire grounds crew at Waters Landing was black.[3] Hamilton asked if it was a problem that the grounds crew was black and Englard did not respond and "just kind of left it like that." (ROA. 435-39). From his tone and lack of response, Hamilton took it that Englard believed that Englard felt African Americans would not be good employees in these positions. (ROA. 435-39).

To understand the meaning of a statement in a particular context or conclude that it is ambiguous requires examining various factors "including context, inflection, tone of voice, local custom, and historical usage." *Ash v. Tyson Foods, Inc*., 546 U.S. 454, 456 (2003).

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[3] Courts have long recognized both that "non-decisionmakers" can and do influence "decisionmakers" and that evidence of discrimination by other supervisors can have independent probative value, depending on the facts of the case. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388 (2008) ("The question whether evidence of discrimination by other supervisors is relevant in an individual [discrimination] case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case."); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000) ("Consequently, it is appropriate to tag the employer with an employee's age-based animus if the evidence indicates that the worker possessed leverage, or exerted influence, over the titular decisionmaker.); *See also Santiago-Ramos v. Centennial P.R. Wireless Corp*., 217 F.3d 46, 55 (1st Cir. 2000) (The plaintiff may use "discriminatory comments . . . made by the key decisionmaker or those in a position to influence the decisionmaker" to establish pretext.); *Ercegovich v. Goodyear Tire & Rubber Co*., 154 F.3d 344, 354-55 (6th Cir. 1998) ("[R]emarks by those who did not independently have the authority or did not directly exercise their authority to fire the plaintiff, but who nevertheless played a meaningful role in the decision to terminate the plaintiff, [are] relevant."); *Griffin v. Washington Convention Ctr.,* 142 F.3d 1308, 1312 (D.C. Cir. 1998) ("Evidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence."). In this case, Robert Englard is the management official that recommended the termination of Hamilton, and, thus, his comment regarding the grounds crew being black is highly relevant.

The idea that "stray remarks" lack probative value is, therefore, properly understood as a vestige of the since-discarded "direct evidence" requirement. Indeed, the Supreme Court rejected the Fifth Circuit's dismissal of certain discriminatory comments as stray remarks in upholding a discrimination verdict in *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 147 (2000).

Discriminatory remarks might not always be "direct evidence," but can constitute powerful circumstantial evidence of bias or discrimination, as the Supreme Court has explicitly recognized. *See Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388 (2008) ("The question whether evidence of discrimination by other supervisors is relevant in an individual [discrimination] case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case.").

Even if the Court concludes that Englard's racial remark was not direct evidence of unlawful race discrimination, then it should be considered circumstantial evidence of discrimination under the Fifth Circuit's teaching in *Laxton*, in which the Court held that a discriminatory remark may be evidence of pretext if the remark demonstrated discriminatory animus and it was made by the person primarily responsible for the decision at hand. *Laxton*, 333 F.3d at 583. The Fifth Circuit no longer applies the stray remark analysis to circumstantial

evidence of racial statements. *Sidiqui v. AutoZone West, Inc*., 721 F.Supp.2d 631, 658 n. 29 (N.D. 2010).

The district court incorrectly concluded that Hamilton did not present evidence about the context of the comment. 2014 WL 1255839 * 5. Indeed, Hamilton testified she heard Englard's comment and took from his statement he did not think black employees would do an adequate job.[4] (ROA. 418, 435-39, 452, 459)(RE 6). Hamilton testified how strange it was that she asked him "is that a problem?" and he did not respond and "just kind of left it like that.". (ROA. 438)(RE 6). While the district court stated that Hamilton asserted that Englard made a strange comment regarding all the grounds crew being black, 2014 WL 1255839 * 5, it is strange because the fact the grounds keepers are black has no relevance to any legitimate business task in the workplace and Englard failed to respond when asked "is that a problem?" (ROA. 438). It was Englard who refused to explain the statement at the time, thus, Hamilton cannot be faulted for not bringing forward troves of evidence regarding the statements meaning.

[4] Such analysis inevitably requires weighing the evidence in light of the foregoing factors, and it is well-settled that weighing evidence is a function reserved for the jury. *Mastsuhia Elec. Indus., Inc. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986) ("On summary judgment the inferences to be drawn from the underling facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.") (quoting *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Further, any inferences about the meaning of the statements must be drawn in favor of the plaintiff at summary judgment, and even if drawing inferences in the plaintiff's favor results in finding the statements to be ambiguous, summary judgment should still be denied so that the jury may resolve the ambiguity. *See Shager v. Upjohn, Co*., 913 F.2d 398, 402 (7th Cir. 1990) ("[T]he task of disambiguating ambiguous utterances is for trial, not for summary judgment. On

It appears that the district court regarded Englard's statement about the all black grounds crew as weak evidence: "Assuming *arguendo* that Englard's comment about race of the grounds crew can be considered circumstantial evidence of discriminatory animus, it is weak evidence, and Hamilton has failed to show any meaningful connection between that comment and the decision to terminate her." 2014 WL 1255839 * 7 (N.D. Tex. 2014). In doing so, the district court seems to have engaged in a function on summary judgment contrary to the Supreme Court's recent admonition that district courts are not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Tolan v. Cotton*, __S.Ct. __, 2014 WL 1757856 * 4 (U.S. 2014).

The Fifth Circuit's opinion in *Johnson v. Maestri-Murrell Prop. Mgmnt, LLC*, 487 Fed. Appx. 134 (5th Cir. 2012) supports Hamilton's position. In *Johnson*, an African American applied for a position as an assistant manager at an apartment complex. 487 Fed. Appx. at 135. The outgoing assistant manager testified that the apartment manager asked if Johnson was black and that she did not think the apartment wanted to hire a black at that complex. 487 Fed. Appx. at 136. The Court noted that while there were no notes on Johnson's resume, while

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a motion fro summary judgment the ambiguities in a witness's testimony must be resolved against the moving party.").

there were notes on the resumes submitted by other applicants. 487 Fed. Appx. at 137.

In reversing the district court's summary judgment that disregarded the comments that the company did not want to hire an African American, the Fifth Circuit observed: "The remarks, if true, provide evidence of discrimination. Hence, the timing of the remarks is much less important than the content of the remarks. In other words, the significant fact to be determined is whether or not unlawful discrimination was involved in the decision made by Maestri–Murrell." *Johnson v. Maestri-Murrell Prop. Mgmt., LLC*, 487 F. App'x 134, 137 (5th Cir. 2012).

In this case as in *Johnson*, the district court failed to properly consider racially related comments made by the decision maker which gave rise to a reasonable inference of unlawful discrimination. 487 Fed App'x at 138.

In *Laxton v. Versus Gap, Inc*., 333 F.3d 572 (5th Cir, 2004), among other evidence, the Court noted evidence of the company's failure to document performance issues with oral or written warnings as required by company policy is some evidence of pretext, although it is not conclusive. 333 F.3d at 581.

The Defendants policy requires even oral performance warnings to be documented. (ROA. 496)(RE 8). The district court failed to acknowledge that oral warnings were required to be documented under Defendants' progressive discipline policy. Defendants admit that it did not give Hamilton any documented

oral or written warning pursuant to its policy. The fact that Defendants did not document any performance issues with Hamilton as required by its policy is evidence that contradicts Defendants assertion that Hamilton had performance issues.

Defendants' failure to follow its progressive discipline policy is some evidence of pretext. *Machinchick v. P.B. Power, Inc*., 398 F.3d 345, 354 (5th Cir. 2005)(employee terminated without being afforded a single verbal or written warning pursuant to employers progressive discipline policy some evidence of pretext).

Moreover, the failure to document any performance issues as required by company policy underminds Defendants' contention that Hamilton had performance issues that required her termination and demonstrates that Defendants articulated reasons are unworthy of credence.

Moreover, the type of conduct which is raised by the Defendants' articulated reason for terminating Hamilton does not fall within its own policy on termination because such conduct, even if true, did not constitute a "serious violation" such as a drug policy violation, fighting or assault, or destruction of company property. (ROA. 496). This also is some evidence that demonstrates the pretextual nature of the termination.

The Fifth Circuit has held "the combination of suspicious timing with other significant evidence of pretext, can be sufficient to survive summary judgment. *Evans v. City of Houston*, 246 F.3d 344, 356 (5th Cir. 2001) *citing Shackelford v. Deloite & Touche*, 190 F.3d 398, 408 (5th Cir. 1999). The close temporal proximity between protected conduct coupled with the lack of any documentary evidence dated before her appearance or demotion that would tend to support a theory of disciplinary problems give rise to a conflict of substantial evidence on the ultimate issue of whether an employee was discriminated against. *Evans*, 246 F.3d at 356. Evidence that demonstrates a bias towards a protected characteristic easily establishes a *prima facie* case that an employee was discharged because of that protected basis. *Rachid v. Jack-In-The-Box, Inc.*, 376 F.3d. 305, 313 (5th Cir. 2004)(reversing summary judgment in discrimination case). The district court's opinion was silent on the issue of timing.

In this case, Robert Englard was aware of Hamilton's race, African American, when he became her supervisor in late May or early June 2011 and terminated her shortly thereafter in June 23, 2011.

"A reasonable juror certainly may infer discrimination when an employer offers inconsistent explanations for the challenged employment action." *Nichols v. Lewis Grocer,* 138 F.3d 563, 568 (5th Cir. 1998). At first, as Hamilton testified, Englard offered no explanation why Hamilton was being let go, then stated she did

not keep up the white board. Later, the Defendants told the EEOC that Hamilton was not able to do the job. Still later, Englard testified that he could not trust Hamilton because several apartments were not ready that were reflected as "ready" on the Waters Landing Make Ready Board. Such inconsistency demonstrates the pretextual nature of Defendants' stated reason, especially in absence of any documented performance issues, and Eaton's own testimony that she had no issues with Hamilton's job performance.

A plaintiff may establish pretext either through evidence of disparate treatment or by showing that the employer's proffered explanation is false or "unworthy of credence." *Reeves*, 530 U.S. at 143. Hamilton testified that Englard's first explanation regarding the reason that she failed to keep up the "make ready" board was false, because she had kept accurate information on the board. *Vaughn v. Woodforest Bank*, 665 F.3d 632, 638 (5th Cir. 2013).

In addition, issues of credibility also may raise issues of pretext. *Laxton*, 333 F.3d at 582. Certainly, the Defendants' failure to document any performance issues along with Eaton changing her testimony regarding Hamilton's performance raises issues regarding the credibility of Defendants' position. (RE 8).

Finally, a few days after Hamilton was terminated her former supervisor Laura Eaton called and asked if Bernie Englard had called Hamilton and indicated that Defendants determined Hamilton was fired for no reason and Bernie Englard

might be calling to offer her job back. (ROA. 479-80). Thus, evidence of Bernie Englard thought terminating Hamilton was a mistake when he was the ultimate decision maker in the first place underminds the Defendants' articulated reason for terminating Hamilton.

Given the strength of Hamilton's prima facie case paired with the ample evidence of pretext surrounding Hamilton's termination, there is a question of fact whether Hamilton's race was a motivating factor in Hamilton's termination by Defendants.

D. DISTRICT COURT ERRED IN FAILING TO CONSIDER ENGLARD'S TESTIMONY REGARDING THE MEANING OF HIS OWN STATEMENT

The district court dismissed Englard's testimony about if he had made the statement why some would conclude he harbored a racial bias as speculation: "Englard's comment about how some unnamed, hypothetical person might perceive his statement is pure speculation." 2014 WL 1255839 fn 9. The district court's sustaining of the objection was an abuse of discretion.

In his deposition, Robert Englard testified as follows:

Q: -- you attended Ms. Hamilton's deposition; correct?

A: yes

Q: And you heard her testify that you made a comment that her – all of her property staff were African/American. You heard her testify to that; correct?

A: Correct

Q: You deny saying that; correct?

Q: Do you understand how someone would think if someone made that statement, that they might have racial bias?

MR. COWGER: Objection, form.

A: I understand. I understand that, yes.

(ROA. 314-15)(RE 7).

One need not look any further for an understanding of the racial statement made by Englard than the testimony of Englard himself: While denying that he made the statement, he acknowledged that if he had made the statement it would evidence a racial bias. Based on this testimony of Englard, reasonable jury could infer racial bias against African Americans on the part of Englard. *Sidiqui v. AutoZone West, Inc*., 721 F.Supp.2d 631, 658 n. 29 (N.D. 2010); *see also Acker v. Deboer, Inc*., 429 F.Supp.2d 828, 846 (N.D. Tex. 2006).

Rule 701 of the Federal Rules of Evidence allows a lay witness to testify in the form of an opinion if it is rationally based on a witness's perception; and helpful to clearly understanding the witnesses testimony or determining a fact in issue. Fed. R. Evid. 701.

Assuming that Englard made the statement as Hamilton testified and as required on summary judgment, Englard's testimony about his own statement is

not speculation, but rather either an admission regarding his state of mind when he made the statement or at least an opinion regarding his understanding of the meaning of the statement.

The district court's ruling on Defendants' speculation objection to Englard's own testimony should be reversed. Englard's testimony about the meaning of his own racially tinged statement, when added to the evidence of pretext recounted above, is additional evidence establishing a question of fact whether Hamilton's race was a motivating factor in Hamilton's termination by Defendants.

E. DISTRICT COURT ERRED IN REFUSING TO CONSIDER LAY OPINION TESTIMONY FROM HAMILTON'S FORMER SUPERVISOR THAT RACE PLAYED A FACTOR IN HAMILTON'S TERMINATION

Hamilton testified that her former supervisor Laura Eaton told her race played a factor in her termination. The district court refused to consider such evidence and sustained the Defendants' objection to such evidence as hearsay and speculation.

Rule 801(d)(2)(E) of the Federal Rules of Evidence provides that a statement is not hearsay if it is offered against an opposing party and it was made by that party's agent or employee on a matter within the scope of the relationship and while it existed.

Hamilton's testimony regarding Eaton's statements is not hearsay or speculation. Eaton made the statement to Hamilton while she was employed by

Defendants. Rule 701 of the Federal Rules of Evidence allows a lay witness to testify in the form of an opinion if it is rationally based on a witness's perception; and helpful to clearly understanding the witnesses testimony or determining a fact in issue. Fed. R. Evid. 701.

Opinion testimony of Hamilton's supervisor Laura Eaton that Hamilton's termination was motivated by race was based upon her perception and would help a jury determine whether Defendants discriminated. *Haun v. Ideal Idus. Inc*., 81 F.3rd 541, 548 (5th Cir. 1996); *see also Hansard v. Pepsi-Cola Metropolitan Bottling Co.,* Inc., 865 F.2d 1461, 1466-67 (5th Cir. 1989). Eaton told Hamilton she believed race was an issue in her termination. Eaton had been Hamilton's supervisor and was familiar with her performance. Eaton was familiar with the circumstances regarding Hamilton's termination. Defendants assert that Eaton provided information used in support of Defendants termination of Hamilton. Eaton told Hamilton that Defendants realized they had made a mistake and wanted to offer Hamilton's job back to her. Eaton's opinion testimony would help a jury determine whether Defendants discriminated against Hamilton because of her race.

The district court's ruling on Defendants' hearsay and speculation objection should be reversed. Hamilton's testimony, when added to the evidence of pretext recounted above, is additional evidence establishing a question of fact whether Hamilton's race was a motivating factor in Hamilton's termination by Defendants.

XII. CONCLUSION AND PRAYER

Hamilton asserts that the district court impermissibly parsed her evidence and failed to view the evidence in the light most favorable to Hamilton as the non-movant in granting summary judgment on her race discrimination claim. *Tolan v. Cotton*, __S.Ct. __, 2014 WL 1757856 * 4 (U.S. 2014).

The evidence of pretext along with Hamilton's prima facie case creates a question of fact on Hamilton's claims of race discrimination. Evidence of the Englard's racial comment, along with evidence of pretext regarding the changing reasons given for termination, the truthfulness of the reason for termination, the failure to document any performance deficiencies as required by Defendants' progressive discipline policy support Hamilton's position that her race was a motivating factor in her termination.

Furthermore, the district court improperly refused to consider Englard's admission of the racial bias evident in his statement about all grounds crew being black and Eaton's expressed opinion to Hamilton that her race was a factor in Hamilton's termination.

There is sufficient evidence to raise a question of fact on Hamilton's claim that her race was a motivating factor in her termination. *Vaughn v. Woodforest Bank*, 665 F.3d 632, 638 (5th Cir. 2013); *Johnson v. Maestri-Murrell Prop. Mgmnt, LLC*, 487 Fed. Appx. 134 (5th Cir. 2012).

Accordingly, Hamilton prays that the Court reverse the district court's summary judgment on her race discrimination claim and remand the case for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the the foregoing document has been served upon counsel for all parties to this proceeding as identified below through the court's electronic filing system as follows:

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,998 words, excluding the parts exempted from brief requirements under Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 in Times New Roman, 14-point.

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CERTIFICATE OF ELECTRONIC SUBMISSION

I hereby certify that: (1) required privacy redactions have been made; (2) the electronic submission of this document is an exact copy of the corresponding paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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